

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 22, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP963

Cir. Ct. No. 2011CV700

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

MARK A. LOCHMAN,

PLAINTIFF-RESPONDENT,

V.

JEROME F. LOCHMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
KENDALL M. KELLEY, Judge. *Reversed in part and cause remanded with
directions.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Jerome Lochman appeals that portion of a judgment awarding attorney fees to his brother, Mark Lochman. Jerome argues

the circuit court erred by awarding Mark attorney fees on Jerome's counterclaim. Mark argues the parties' contract allowed him to recover those fees.

¶2 We conclude the contract is ambiguous with respect to whether Mark can recover attorney fees on the counterclaim. Under *Borchardt v. Wilk*, 156 Wis. 2d 420, 456 N.W.2d 653 (Ct. App. 1990), the circuit court should therefore have reduced Mark's total attorney fee award in proportion to the amount Mark recovered on his claim less the amount Jerome recovered on the counterclaim. Accordingly, we reverse that portion of the judgment awarding Mark attorney fees and remand for the circuit court to recalculate Mark's attorney fee award.

BACKGROUND

¶3 On September 1, 2000, Jerome gave Mark a promissory note worth \$45,000 in exchange for Mark's interest in a property the brothers jointly owned. The note provided, "In the event this note shall be in default, and placed with an attorney for collection, then [Jerome] agree[s] to pay all reasonable attorney fees and costs of collection." Mark sued Jerome in March 2011, alleging Jerome had defaulted on the note and owed Mark the remaining balance of \$15,666.57, plus interest. Relying on the language cited above, Mark also asked the court to award him reasonable attorney fees.

¶4 In response, Jerome asserted as an affirmative defense that he and Mark had reached an agreement whereby Jerome would give up his claim to certain wooden boats and vintage motors that had belonged to the parties' late father, and, in exchange, Mark would relieve Jerome of his obligation to repay the note's remaining balance. Jerome also asserted a counterclaim against Mark for conversion of the boats and motors. The counterclaim alleged that Jerome, Mark,

and their siblings William Lochman and Barbara Evans each had a one-fourth interest in the boats and motors. The counterclaim further alleged that Mark was in possession of the boats and motors and had refused Jerome's demand to divide them. William and Barbara subsequently intervened in the action and filed claims against Mark for division of the boats and motors.

¶5 The parties ultimately reached a partial settlement, under which Mark agreed to transfer some of the boats and motors to Jerome, William, and Barbara. William's and Barbara's claims against Mark were dismissed, along with Jerome's counterclaim. Mark and Jerome stipulated that the only remaining issues for trial were: (1) whether Jerome had made an initial \$2,000 payment on the note in September 2000; and (2) whether the note entitled Mark to recover the attorney fees he incurred to defend against Jerome's counterclaim.

¶6 Following a bench trial, the circuit court ruled in Mark's favor on the first issue, concluding Jerome had not made an initial \$2,000 payment on the note. The court awarded Mark \$20,670.54 on his claim for default. On the second issue, the court concluded the note entitled Mark to recover all the attorney fees he incurred in the litigation, including those related to Jerome's counterclaim. The court therefore awarded Mark actual attorney fees of \$26,550.50. It also awarded him \$634.12 in statutory costs.¹

¹ WISCONSIN STAT. § 814.035(2) provides, "When the causes of action stated in the complaint and counterclaim ... arose out of the same transaction or occurrence, costs in favor of the successful party upon the complaint and counterclaim ... so arising shall be in the discretion of the court." The circuit court's award of statutory costs to Mark included "filing fees, service of process, postage, photocopies, faxes and communication costs[.]" Jerome does not develop any argument on appeal that the court's award of statutory costs was erroneous.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶7 Jerome moved for reconsideration of the court’s attorney fee award. He argued the counterclaim was “separate and distinct” from Mark’s claim for default, and, consequently, any attorney fees incurred to defend against the counterclaim did not constitute reasonable costs of collection, as required by the note. The court denied Jerome’s motion, reasoning:

Jerome intertwined the two issues by choosing to attach the counterclaim to the collection of the Note and by asserting that the counterclaim was the reason he stopped paying on the Note. In order to succeed in collecting on the Note, Mark was forced to respond to Jerome’s counterclaim, much like if it were an affirmative defense. Because Mark would not have been able to collect on the Note without responding to Jerome’s affirmative defense, the attorney’s fees accrued in responding to the counterclaim are a reasonable cost of collection under the circumstances.

Jerome now appeals, challenging only the court’s decision to award Mark attorney fees on the counterclaim.

DISCUSSION

¶8 “Under the American Rule, litigants must pay their own attorney fees unless there is a statute or enforceable contract providing otherwise.” *Klemm v. American Transmission Co.*, 2011 WI 37, ¶42, 333 Wis. 2d 580, 798 N.W.2d 223. The circuit court concluded the parties’ contract entitled Mark to recover the attorney fees he incurred to defend against Jerome’s counterclaim.² A party is not

² On appeal, Jerome argues the circuit court erroneously exercised its discretion under WIS. STAT. § 814.035(2) by awarding Mark attorney fees on the counterclaim. However, this argument misses the mark. The circuit court relied on the parties’ contract as the basis for its attorney fee award, not § 814.035(2). Moreover, our review of the record shows that Mark never cited § 814.035(2) in the circuit court or argued the court’s attorney fee award was improper under that statute. We generally refuse to address issues raised for the first time on appeal. See *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

(continued)

entitled to attorney fees based on a contractual provision unless the contract language “clearly and unambiguously so provides.” *Hunzinger Constr. Co. v. Granite Res. Corp.*, 196 Wis.2d 327, 340, 538 N.W.2d 804 (Ct. App. 1995). Whether a contract is ambiguous is a question of law that we review independently. *Schmitz v. Grudzinski*, 141 Wis. 2d 867, 416 N.W.2d 639 (Ct. App. 1987). “A contract is ambiguous when it is reasonably susceptible of more than one meaning.” *Id.*

¶9 As explained above, the note Jerome executed stated that if it were “in default and placed with an attorney for collection,” Jerome would pay “all reasonable attorney fees and costs of collection.” In a previous case, we concluded similar language was ambiguous as to whether a party seeking to enforce a note could recover attorney fees incurred to defend against the debtor’s counterclaim. *See Borchardt*, 156 Wis. 2d at 427.

¶10 In *Borchardt*, Barbara Borchardt sued Gerald and Patricia Wilk, alleging they had defaulted on a promissory note. *Id.* at 422. The Wilks counterclaimed, alleging negligent, intentional, and strict responsibility misrepresentation. *Id.* at 423. Following a jury trial, Borchardt was awarded \$9,469.20 on her claim, and the Wilks were awarded \$9,000 on their counterclaim. *Id.* The circuit court subsequently awarded Borchardt her actual attorney fees on both the claim and counterclaim, based on the following language from the note:

We also observe that WIS. STAT. § 814.035(2) does not permit a court to award actual attorney fees. Instead, it gives the court discretion to award “costs” to the successful party on a counterclaim. WIS. STAT. § 814.035(2). The term “costs” includes only limited attorney fees ranging from \$100 to \$500, depending on the amount recovered on the underlying claims. WIS. STAT. § 814.04(1). Here, the circuit court awarded Mark his actual attorney fees, based on the parties’ contract, and made a separate award of statutory costs pursuant to § 814.035(2).

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

Id. at 423, 425.

¶11 We reversed the circuit court's attorney fee award, concluding the note was ambiguous as to whether Borchardt could recover attorney fees on the Wilks' counterclaim. We explained that "reasonable persons could differ as to whether Borchardt's *defense* of the counterclaim constitutes *enforcement* of the note under the language of the note." *Id.* at 427. We also observed the note was "silent" as to whether Borchardt could recover attorney fees incurred to defend against a counterclaim on which the Wilks prevailed. *Id.*

¶12 Because the note was ambiguous, we concluded Borchardt was not entitled to recover the full amount of her attorney fees on both the claim and counterclaim. Instead, we adopted the "general rule" from other jurisdictions that "where reasonable attorney's fees or some designated percentage is provided for in the note, and the plaintiff recovers on the note and the defendant recovers on the counterclaim, the amount recoverable for attorney's fees is reduced in proportion to the amount recovered on the note less the amount recovered on the counterclaim." *Id.* at 428 (citing *Pioneer Constructors v. Symes*, 267 P.2d 740, 744 (1954)).³ We explained, "To hold otherwise would obligate a party who, in whole or in part, has successfully prosecuted a claim against another to pay the

³ In a later case, we observed that applying this rule would have resulted in Borchardt's attorney fee award being reduced by "95.04%—the proportion by which [her] recovery was offset by the Wilks' counterclaim." *Shadley v. Lloyds of London*, 2009 WI App 165, ¶19, 322 Wis. 2d 189, 776 N.W.2d 838.

latter's attorney's fees; in short, the winner pays the loser. This is contrary to fundamental concepts of justice and fair play.” *Id.*

¶13 The attorney fee provision in the Lochmans' note is no less ambiguous than the provision at issue in *Borchardt*. The Lochmans' note merely states that, if it is in default and placed with an attorney for collection, Jerome will pay “all reasonable attorney fees and costs of collection.” Reasonable people could differ as to whether defending against Jerome's counterclaim for conversion constituted a reasonable cost of collecting the money Jerome owed under the note. Moreover, as in *Borchardt*, the Lochmans' note does not mention counterclaims, and it does not explain how Jerome's success on a counterclaim affects Mark's attorney fee award. Thus, like the note in *Borchardt*, we conclude the Lochmans' note is ambiguous with respect to whether Mark can recover attorney fees on Jerome's counterclaim.

¶14 We also observe that, like the defendants in *Borchardt*, Jerome prevailed on his counterclaim. Thus, by ordering Jerome to pay Mark's attorney fees on the counterclaim, the circuit court “obligate[d] a party who, in whole or in part, has successfully prosecuted a claim against another to pay the latter's attorney's fees[.]” *Id.* Like the *Borchardt* court, we conclude this result is “contrary to fundamental concepts of justice and fair play.” *Id.* Theoretically, the parties' contract could have explicitly stated that Jerome would pay any attorney fees Mark incurred to defend against a counterclaim, even if Jerome ultimately prevailed on that counterclaim. However, we will not construe the ambiguous attorney fee provision in the parties' contract to dictate that result.

¶15 We therefore reverse in part and remand for the circuit court to recalculate Mark's attorney fee award. On remand, the court should apply the rule

set forth in ***Borchardt*** and reduce Mark’s attorney fees “in proportion to the amount recovered on the note less the amount recovered on the counterclaim.” ***Id.***

By the Court.—Judgment reversed in part and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

